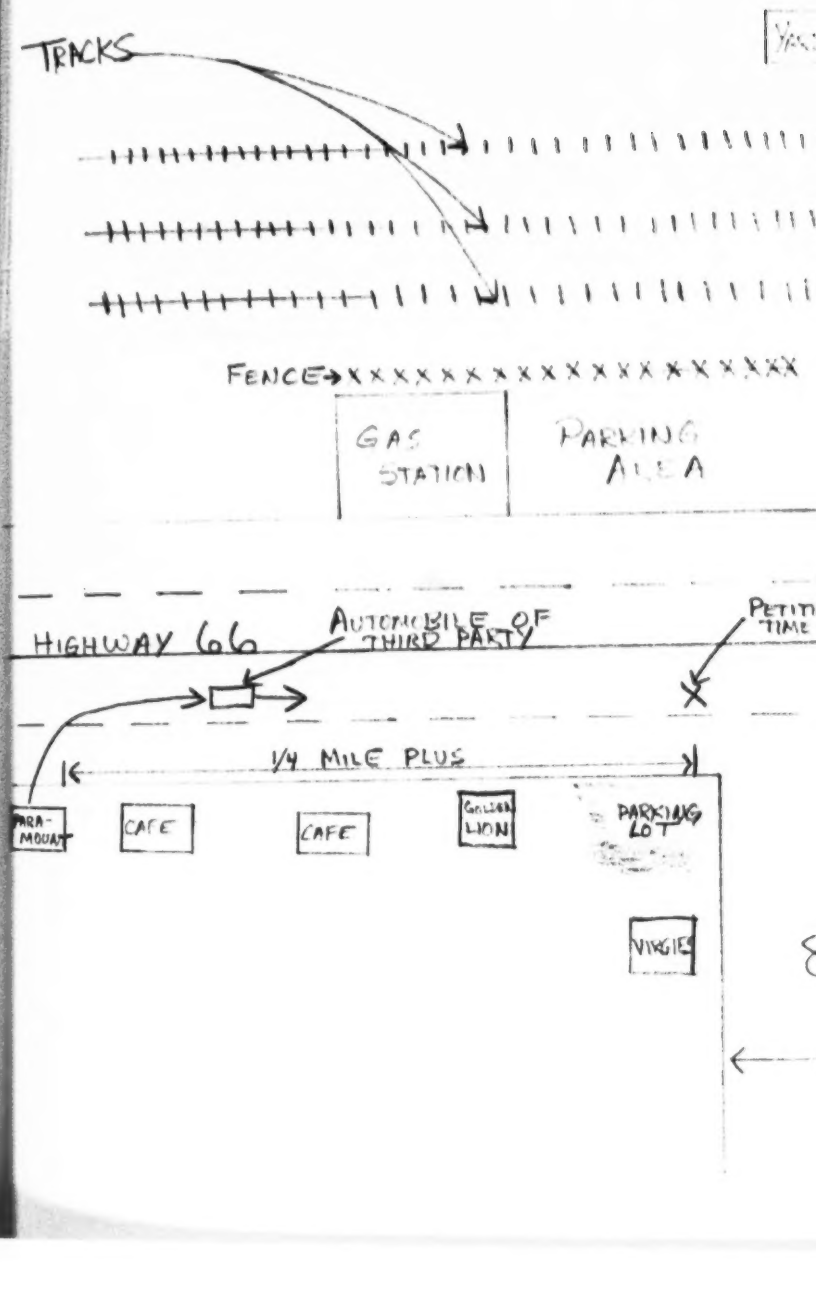
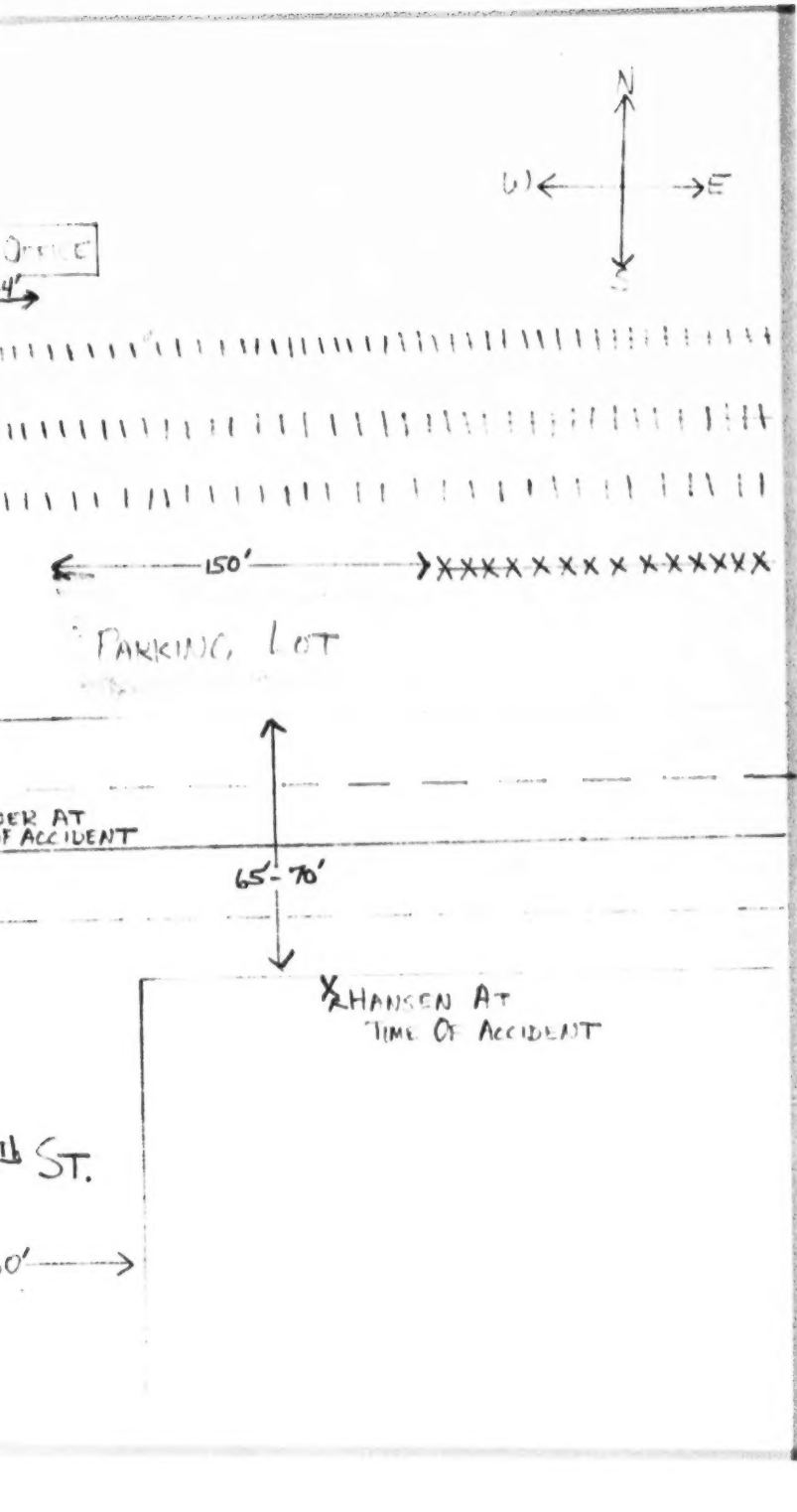

TRACKS
FENCE
GAS STATION
PARKING AREA
HIGHWAY 66
AUTOMOBILE OF THIRD PARTY
1/4 MILE PLUS
CAFE
CAFE
GOLDEN LION
PARKING LOT
VIKGIES


N
W
E
150'
PARKING LOT
65'-70'
X HANSEN AT
TIME OF ACCIDENT
ST.

APPENDIX B.

Opinion of the Court of Appeal.

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal of the State of California, First Appellate District, Division Three.

Florence E. Smith, Administratrix of the Estate of Robert Smith, deceased, Plaintiff and Appellant, vs. Southern Pacific Company, a corporation, Defendant and Respondent. 1 Civil 27643 (Sup. Ct. No. 573,-210).

Filed: October 28, 1971.

Plaintiff appeals from a judgment notwithstanding the verdict entered in favor of defendant and from an order granting motion for new trial.

On December 1, 1966, appellant, as administratrix of the estate of Robert Smith, filed an action under the Federal Employers' Liability Act, 45 U.S.C.A., section 51, et seq., alleging that the deceased had been killed as a result of the negligence of the defendant in failing to furnish deceased with a reasonably safe place to work and reasonably safe and suitable equipment.

The jury returned a verdict for plaintiff in the sum of $50,000 and the trial court granted a motion for judgment notwithstanding the verdict and the order granting motion for a new trial.

The sole issue necessary for consideration on this appeal is whether there is a complete absence of probative facts that negligence of the employer played a part in causing the death for which damages are sought.

The evidence disclosed that on April 12, 1966, at approximately 4:00 a.m., Robert Smith (Smith), a

44-year-old switchman employed by the Southern Pacific Company (S.P. Co.) was struck and killed by an automobile while crossing Alameda Street in an industrial part of Oakland.

On the night of the accident, Smith was the foreman of a crew of four. The crew's duties consisted of picking up and delivering freight cars to and from various "side industries" whose tracks connected with the railroad tracks. The industries were located on one side of Alameda Street. The S.P. Co.'s railroad tracks were located on the street side and connecting tracks crossed Alameda Street.

Although the exact reasons that Smith walked across Alameda Street are unknown, it may be accepted that he was in the course of his employment. He apparently intended to open certain gates of the American Can Company or to use a phone on S.P. Co.'s business. Both activities would come within the duties of his employment. Alameda Street was a long industrial street with no intersections or crosswalks in the immediate area. The night was dark, the street lighting was poor, and it was misty. Smith was wearing a yellow hard hat and was carrying a lighted switchman's lantern. Smith got to a point near the middle of Alameda Street when he was struck by an automobile driven by Mrs. Trudy Bales Coker. Mrs. Coker did not see Smith before she collided with him.

Mrs. Coker at the time of the accident was driving approximately 40-45 miles per hour in a 25-mile per hour zone in an attempt to elude a would-be suitor who was chasing her in his car. In attempting to do so, she had turned out her headlights. She also testified that she was not watching the road consistently during

the chase but was glancing over her shoulder and looking into her rear view mirror in an attempt to keep an eye on the car following her.

On the evening in question, Mrs. Coker had been working at her job as a barmaid until sometime after 2:00 a.m. She had been drinking beer. Although the extent of her drinking was not brought out with certainty, she conceded that she felt the effects of the beer. She felt "[j]ust kind of relaxed; not drunk or not sober, but just relaxed." She was initially charged with felony vehicular manslaughter. Subsequently, the charge was reduced to felony hit-and-run to which she pleaded guilty.

As this case is based upon the Federal Employees' Liability Act, the question of sufficiency of the evidence is controlled by federal law. (Waller v. Southern Pacific Co., 66 Cal.2d 201, 206.)

In *Rogers v. Missouri Pacif. R. Co.*, 352 U.S. 500, the United States Supreme Court laid down the rule that "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Emphasis added.)" (Id. at 506-507.)

Appellant points to two ways in which the jury could reasonably have concluded that the employer was negligent. First, the jury could have agreed that S.P. Co. should have eliminated the need to cross the street. Second, in those instances where Smith neces-

sarily had to cross, S.P. Co. should have provided equipment which would have made the employee crossing the street more visible to traffic, such as a helmet with phosphorous strips, a luminous vest or a flashlight with a phosphorous wand. Appellant also emphasizes that there were employee complaints regarding the danger and frequent accidents in the area.

"The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' [Citations.]" (Mortensen v. Southern Pacific Co., 245 Cal.App.2d 241, 244.)

In *Simpson v. Texas and New Orleans Railroad Company*, 297 F.2d 660, the court said: ". . . [T]he plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the negligence of the employer railroad, . . .

* * * * *

"No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results from the action of some third person. . . ." (Id. at 662.)

Appellant suggests that the danger of crossing the street on foot could have been eliminated by having American Can Employees open the gates and by relocating the phone. We cannot agree, however, that the failure to do so created a danger. There was no satisfactory evidence that the area was particularly hazardous.

Appellant's argument that the railroad company should have furnished additional safety equipment does not find reasonable support under the circumstances here. The equipment suggested by appellant required a light source to be shining on it which would not have benefited Smith as the car was being driven without lights. Also it was not shown that this suggested light source would be any more visible than the lantern appellant was carrying. The most highly visible piece of equipment mentioned in the case was a flare which was in fact available to appellant had he felt he was in a position which warranted its use.

At the time of the accident, Smith was wearing a "bright yellow" hard hat, was carrying a railroad lantern that was used for railroad signalling for distances up to one mile. Smith was the engine foreman on the train switching detail and he, undoubtedly, could have provided warning lights, flares, etc., if there was an existing danger.

Here Smith was hit by a motorist driving an automobile far in excess of the state's speed limits, while under the influence of alcohol, in the dark of night with the headlights of her vehicle turned off. Further, Mrs. Coker believed she was looking in the rear view mirror at the moment of impact. Under these circumstances, she would not have seen Smith regardless of his clothing or what he was carrying.

We have determined that appellant has not met the burden of proving that the street where deceased was walking was an unsafe place to work. (See Inman v. Baltimore Ohio R. Co., 361 U.S. 138.) We believe that the trial court was justified in concluding that the sole cause of the accident in question was the negligent

driving of the vehicle by Mrs. Coker and that there is a complete absence of probative facts that any lack of care of respondent played a part in the death for which damages are sought.

The judgment notwithstanding the verdict is affirmed. The appeal from the order granting a new trial is dismissed as moot. (Code Civ. Proc., § 629; Kaake v. Lott, 252 Cal.App.2d 895, 901.)

CERTIFIED FOR NONPUBLICATION

Brown (H. C.), *J.*

We concur:

Draper, *P. J.*

Caldecott, *J.*